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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. EDDIE LEE WANDICK, Defendant and Appellant.	C040921 (Super.Ct.No. 01F05382)

APPEAL from a judgment of the Superior Court of Sacramento County, Patricia C. Esgro, J. Affirmed.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, J. Robert Jibson, Supervising Deputy Attorney General, Charles Fennessey, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Eddie Lee Wandick of possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)). He was sentenced to three years in state prison.

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* Pursuant to California Rules of Court, rules 976.1(b) and 976.1, this opinion is certified for publication with the exception of parts I and II.

On appeal from the judgment, defendant contends that (1) the trial court erred in making certain in limine rulings, which prevented him from fully presenting his defense; (2) there was insufficient evidence that the amount of cocaine base in his possession was a usable quantity; and (3) the trial court violated Proposition 36 by failing to place him on probation. We affirm the judgment.

FACTS AND PROCEEDINGS

On July 8, 2001, Sacramento police took the intoxicated defendant into custody following a fight with his brother. Officers Gullion and Halstead escorted defendant into the booking area of the county jail where Officer Hidalgo conducted a search. The search was recorded by a surveillance camera, and the videotape was played for the jury.

At the beginning of the search, defendant repeatedly requested that he be allowed to take the shoelaces out of his shoes; each time the request was refused. When defendant removed his left shoe, a piece of paper fell to the floor. Officer Hidalgo testified that he saw the paper fall out of defendant's shoe although the videotape is inconclusive on this point.

Hidalgo picked up the paper and handed it to Officer Halstead. Halstead opened the paper and observed a dry, chalk-like substance on it. The substance was the size of half a peanut and weighed .03 gram. Halstead and Gullion performed a "[V]altox" test on it, which is a presumptive test to determine

the presence of narcotics. The test was positive for a central nervous system stimulant and cocaine base.

The paper was then sent to the police crime laboratory for analysis. The laboratory performed a presumptive test, followed by a confirmatory test. The item was found to contain cocaine base, which is a solid, pure form of cocaine; the net weight of the drug was .01 gram.

Defendant, who represented himself at trial, maintained that he did not bring contraband into the jail. While freely admitting that he smoked cocaine, he told the jury: "I stay in the misdemeanor's ring. Misdemeanors only. I'm not going back to prison for a felony for no reason." He suggested that the paper became stuck to his shoe during the search, an inference which he supported by eliciting an admission from Officer Hidalgo that the inmate search area is not routinely cleaned after each booking.

APPEAL

I

In Limine Rulings

At a pretrial hearing, the prosecutor disclosed that Officer Hidalgo, who did not perform the Valtox test, wrote a note on the back of defendant's booking photograph indicating that the substance in his possession tested positive for methamphetamine. The note was in error -- in fact the Valtox test indicated a positive result for both methamphetamine and cocaine base. The hearing also disclosed that the substance

found in the booking area weighed .03 of a gram. However, the officers chipped off a piece in order to conduct the test, such that the sample received by the crime laboratory weighed only .01 of a gram.

The prosecutor moved to exclude the note on the back of the booking photograph on grounds that it would confuse the jury because it was incorrect and that it was the product of a test that was not scientifically reliable. The trial judge granted the motion, pointing out that the note was also hearsay because Hidalgo did not personally perform the test.

Asserting that the discrepancy between the amount found in the jail and the amount tested by the crime laboratory was significant, defendant suggested that someone had been "playing with this drug," and asserted that he had a right to bring out the fact the substance initially weighed .03 of a gram. The judge disagreed, telling defendant that he was not charged with .03 of a gram, but only .01 of a gram. On its own motion, the court instructed defendant not to mention the weight of .03 of a gram in front of the jury. Defendant takes exception to these rulings. We consider each individually.

Hidalgo's Note

Defendant claims the note was not a statement, but conduct, and therefore not hearsay. Because it contains information at variance with the results of the laboratory test, he claims its exclusion deprived him of a fertile area of cross-examination that would have helped him establish reasonable doubt.

The note was properly excluded as inadmissible hearsay. "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at a hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Officer Hidalgo did not perform the test. His note was a statement of what someone else told him about the test results. It was thus a classic form of hearsay.

Defendant's one-sentence assertion that the entry fell within the business record exception to the hearsay rule (Evid. Code, §§ 1271, 1280) must be dismissed because this theory of admissibility was never presented to the trial court. (See *People* v. *McPeters* (1992) 2 Cal.4th 1148, 1188.)

Even if the note was not barred by application of the hearsay rule, the trial court acted within its discretion in excluding it because it did not reflect the true result of the test and thus would have unduly confused the jury. (Evid. Code, § 352.)

Finally, the record is clear that the court's in limine ruling did not prejudice defendant. (*People* v. *Whitson* (1998) 17 Cal.4th 229, 251; *People* v. *Watson* (1956) 46 Cal.2d 818, 836.) When Officer Gullion, who performed the Valtox test, was called to the stand he admitted under cross-examination by defendant that the test yielded a positive result for both a nervous system stimulant and cocaine base. Subsequently, the jury learned that according to the test administered by the crime laboratory, only cocaine base was found. Thus, the jury was made aware of both the results of the Valtox test and the

ultimate discrepancy between that test and the laboratory analysis. Defendant had the ability to use these facts for whatever purpose he wished in mounting his defense. The court's pretrial ruling amounted to harmless error, at best.

Reference to .03 of a Gram

Defendant complains that the trial court improperly curtailed his defense by prohibiting any reference to the fact that the original substance recovered from the booking area weighed .02 of a gram less than the laboratory sample. Again, the record shows that the in limine ruling had no effect on the outcome of the trial.

The court said nothing in chambers about the weight discrepancy. The judge merely instructed defendant not to mention the initial weight of .03 of a gram. Even this ruling, however, became moot when Officer Halstead testified that the substance found on the paper weighed .03 of a gram when it was seized, and the prosecutor revealed that the substance weighed only .01 of a gram when it arrived at the laboratory. Officer Halstead then explained that a portion of the sample had been broken off in order to perform the field test. Once the weight discrepancy became known, defendant was never prohibited from utilizing it in cross-examination or otherwise.

II

Substantial Evidence of Usable Quantity

Officer Halstead testified as an expert on what constitutes a usable quantity of cocaine base. He opined that the substance in question was "more than enough for personal use."

When told that the substance tested by the crime laboratory weighed only .01 of a gram, Halstead maintained that it would still be a usable quantity. He stated that .01 of a gram was a common weight on the street, known as a "ten-dollar rock." A rock weighing .05 grams would be known as a "nickel" or a "five-dollar rock."

Seizing on the fact that the crime laboratory expert testified the powdery substance on the paper contained cocaine base with a "net weight" of .01 of a gram, defendant claims there was no substantial evidence to support a finding that such a small quantity was usable. We disagree.

Halstead testified that he personally examined the substance, that it weighed .03 of a gram when it was first recovered from the booking area, and could be put in a pipe and smoked. The fact that the "net weight" of pure cocaine found by the crime laboratory was .01 of a gram is immaterial, because, as Halstead himself made clear, cocaine base is almost always found in adulterated form.

As the California Supreme Court explained in *People v. Rubacalba* (1993) 6 Cal.4th 62, the "usable-quantity rule prohibits conviction only when the substance possessed simply

cannot be used, such as when it is a *blackened residue* or a *useless trace*. It does not extend to a substance containing contraband, even if not pure, if the substance is in a form and quantity that can be used. No particular purity or narcotic effect need be proven." (*Id.* at p. 66, italics added.)

Here, the record established that the substance was in a form that could be consumed and the laboratory test result showed that it contained pure cocaine base. Nothing more was required to satisfy the "usable quantity" element.

III

Asserted Proposition 36 Error

On December 15, 2001, while awaiting trial on the present charge, defendant committed grand theft (Pen. Code § 487; subsequent unspecified statutory references are to the Penal Code). By the time he appeared for sentencing on the present conviction, he had been convicted of grand theft and sentenced to two years in prison.

At the sentencing hearing, the court and both attorneys agreed defendant was not eligible for a grant of probation under Proposition 36, owing to the grand theft conviction. The court then sentenced him to the upper term of three years in prison on the present offense.

Defendant now claims that the court erred in declaring him ineligible for probation under Proposition 36. He invokes section 1210.1, subdivision (a), which requires probation and

drug treatment for persons convicted of a nonviolent drug possession offense.

Subdivision (a) of section 1210.1 provides, in pertinent part, that "[n]otwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation, As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program."

Although, subdivision (b) of section 1210.1 contains exceptions for defendants who were previously convicted of serious or violent felonies and who have not remained free of prison custody for five years (the five-year "washout" provision), and for defendants who are convicted of additional felonies in the *same proceeding*, defendant asserts that he did not fall within either exception, because (1) the grand theft was committed *after* the drug offense, not before it, and he therefore was not disqualified under the five-year "washout" provision (see *People v. Superior Court (Jefferson)* (2002) 97 Cal.App.4th 530, 536), and (2) the grand theft conviction occurred in a *separate* proceeding.

The People reply that although defendant literally did not fit within any of the exceptions set forth in section 1210.1, subdivision (b), sentencing him to probation and noncustodial drug treatment would be contrary to the spirit of Proposition 36 and an exercise in futility in light of defendant's conviction and prison confinement for grand theft. We agree.

In *People v. Esparza* (2003) 107 Cal.App.4th 691, review denied June 25, 2003, this court faced an analogous situation. Esparza was convicted of a nonviolent drug offense while on probation for felony vandalism. He was sentenced to prison on both offenses.

In rejecting Esparza's claim that he should have been placed on probation for the drug offense, we first noted that "'[g]ranting Proposition 36 treatment to a probationer who . . . was convicted of a crime *unrelated* to drug possession as well as a drug possession offense, would be directly contrary to the purpose of the statute.'" (*People v. Esparza, supra,* 107 Cal.App.4th at p. 697, quoting *People v. Goldberg* (2003) 105 Cal.App.4th 1202, 1208.) We also pointed out that, the term "drug treatment program," as defined in the statute, specifically excluded treatment programs offered in jail or prison facilities. (*Id.* at pp. 698-699, citing § 1210, subd. (b).) Because Esparza was sentenced to prison on the vandalism charge with no access to drug treatment, "the trial court was not required to engage in the superfluous act of placing a defendant on probation when he could not participate in the treatment program required as a condition of that probation. We do not construe statutes to create absurd results." (*Id.* at p. 698.)

We apply *Esparza*'s reasoning to uphold the trial court's refusal to grant defendant probation under Proposition 36. Defendant's prison incarceration for committing grand theft rendered him ineligible to receive the treatment required of

Proposition 36 probationers. He was thus not amenable to drug treatment within the meaning of the statute because he was unavailable to participate in the specified treatment programs. (See *People v. Esparza*, *supra*, 107 Cal.App.4th at p. 699.)

Likewise, defendant's commission of a nondrug felony while awaiting trial on his drug charge took him out of the class of nonviolent substance abusers for whom the voters intended rehabilitative treatment when they passed Proposition 36.

According to the probation report, at the time he committed the present drug offense, defendant was already on informal probation for no less than five additional crimes.

The purpose of the initiative was to get immediate help for nonviolent drug addicts, not to provide a "Get Out Of Jail Free" card to career criminals who also happen to partake of drugs. (Cf. *People v. Superior Court (Jefferson)*, *supra*, 97 Cal.App.4th at p. 537.) The trial court was not required to apply Proposition 36 literally where such application would plainly conflict with the intent of the statute. (See *People v. King* (1993) 5 Cal.4th 59, 69.)

DISPOSITION

The judgment is affirmed. **(CERTIFIED FOR PARTIAL PUBLICATION.)**

HULL, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.